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04 UNITED STATES DISTRICT COURT  
05 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

06 MATTHEW G. SILVA, ) CASE NO. C08-1447-RSM-MAT  
07 Plaintiff, )  
08 v. ) ORDER TO SHOW CAUSE  
09 KING COUNTY, et al., )  
10 Defendants. )  
11 \_\_\_\_\_ )

12 This is a civil rights action pursuant to 42 U.S.C. §1983. Plaintiff is a Washington state  
13 prisoner currently incarcerated in the Washington State Penitentiary. He was formerly confined  
14 in the King County Jail (“Jail”). He brings this action *pro se* challenging the Jail’s policy of  
15 monitoring and recording the telephone conversations of all inmates. Plaintiff identifies a total of  
16 seventeen defendants, including King County, County employees, Jail staff, and numerous  
17 prosecutors. Defendants have not been served with a copy of the complaint. Pursuant to 28  
18 U.S.C. § 1915A, the Court has reviewed the complaint and finds and ORDERS as follows:

19 (1) The following facts are alleged in plaintiff’s complaint: Plaintiff was confined in  
20 the Jail from April 2004 until October 6, 2005.<sup>1</sup> (Dkt. No. 1 at 9). It appears that plaintiff was

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22 <sup>1</sup> Plaintiff has been a frequent litigator in federal court, having initiated approximately a  
dozen civil actions. The Court takes judicial notice of certain facts that have been established in

01 originally confined at the Jail as a pretrial detainee but his status changed when he was convicted  
02 of robbery in February 2005. (Case No. C04-1484, Dkt. No. 302 at 4, n.2). While confined at  
03 the Jail, plaintiff was subject to the Jail's policy of monitoring and recording the telephone  
04 conversations of all inmates. Plaintiff alleges that the Jail also monitored and recorded his calls  
05 to his attorneys.<sup>2</sup> (Dkt. No. 1 at 9). Plaintiff alleges that as a result, he suffered from mental  
06 anguish and emotional distress. (*Id.* at 9). Plaintiff cites no specific effect on any litigation that  
07 resulted from the telephone monitoring.

08 On September 29, 2008, the Court received the instant civil rights complaint. Ordinarily,  
09 when a prisoner submits a pleading, the pleading is deemed filed on the day that it is given to  
10 prison officials for delivery to the Court, under the so-called "prison mailbox rule." *See Houston*  
11 *v. Lack*, 487 U.S. 266, 270 (1988). Here, however, the rule is inapplicable because the complaint  
12 and filing fee were hand-delivered to the Court by someone on plaintiff's behalf. Therefore, the  
13 date of filing of the complaint is the date it was received, September 29, 2008.

14 Plaintiff asserts that the monitoring and recording of his phone calls provides the basis for  
15 three claims arising under the federal constitution: (1) violation of his right to procedural due  
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17 plaintiff's prior cases. For example, plaintiff does not specifically state here that his confinement  
18 at the Jail ended on October 6, 2005, but in a prior case, plaintiff informed the Clerk that he was  
19 transferred on that date from the Jail into the custody of the Washington Department of  
Corrections. (Dkt. No. 250 in Case No. C04-1484-JCC). The Court therefore infers that he was  
transferred out of the Jail on October 6, 2005.

20 <sup>2</sup> The Court notes that in prior cases in this district, the Jail has acknowledged that it  
21 records phone calls of inmates, but denies recording calls between inmates and their attorneys. *See,*  
22 *e.g., Burnhart v. Holgeerts*, Case No. C06-816-RSL (Dkt. No. 48 at 3). Furthermore, Jail  
officials have also stated that notices are conspicuously posted near the phones alerting inmates  
that their calls are monitored. (*Id.*)

01 process; (2) violation of his right to substantive due process; and (3) violation of his right to  
02 effective assistance of counsel. (Dkt. No. 1 at 10-11). In addition, plaintiff contends that the  
03 monitoring and recording of his phone calls gives rise to three claims under state law: (1)  
04 negligence; (2) outrage; and (3) breach of contract. (*Id.* at 11-12).

05 (2) Section 1915A of Title 28, United States Code, entitled, “Screening,” provides that  
06 the Court “shall review . . . as soon as practicable after docketing, a complaint in a civil action in  
07 which a prisoner seeks redress from a governmental entity or officer or employee of a  
08 governmental entity.” 28 U.S.C. § 1915A(a). If the Court finds that the complaint “is frivolous,  
09 or fails to state a claim upon which relief may be granted,” the Court must dismiss the complaint.  
10 28 U.S.C. § 1915A(b).

11 At the outset of this screening process, the Court notes two principles that considerably  
12 narrow the scope of plaintiff’s lawsuit: First, the applicable statute of limitations is Washington’s  
13 three-year statute of limitations for personal injury actions. *See Joshua v. Newell*, 871 F.2d 884,  
14 886 (9th Cir. 1989). Application of this statute of limitations to the instant lawsuit bars all of  
15 plaintiff’s claims that arose more than three years before the filing of the complaint. Plaintiff filed  
16 his complaint on September 29, 2008; therefore, the cut-off date for his claims is three years prior,  
17 or September 29, 2005. Because plaintiff’s confinement at the Jail ended on October 6, 2005, this  
18 leaves only a one-week period, between September 30, 2005 and October 6, 2005, during which  
19 any viable claims must have arisen.<sup>3</sup> Second, the Ninth Circuit has held that “no prisoner should

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21 <sup>3</sup> Although the statute of limitations is an affirmative defense, it may be grounds for  
22 dismissal when it is clear from the face of the complaint that it applies. *See Jones v. Bock*, 549  
U.S. 199, 215 (2007); *see also Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (indicating  
that *sua sponte* dismissal may be appropriate where the record is clear that prisoner conceded

01 reasonably expect privacy in his outbound telephone calls,” unless the calls are made to an  
02 attorney. *United States v. Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996). This principle means that  
03 plaintiff may not assert a constitutional violation based upon calls he made to non-attorneys. In  
04 light of these two principles, the sole viable claim presented in plaintiff’s complaint is that the Jail  
05 recorded his calls to his attorney between September 30, 2005 and October 6, 2005. Because  
06 plaintiff bases this factual claim on three different legal theories, the Court will address each theory  
07 in turn.<sup>4</sup>

#### 08 Procedural Due Process

09 Plaintiff’s claim that the recording of his phone calls violated procedural due process  
10 appears to be based upon his argument that the state here created a “liberty interest that entitled  
11 [him] to avoid having his phone calls monitored and recorded.” (Dkt. No. 1 at 10). Plaintiff cites  
12 *Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002), for support. However, plaintiff’s reliance  
13 on *Valdez* is misplaced because the Ninth Circuit held in *Valdez* that the statute at issue did *not*  
14 create a liberty interest. *See* 302 F.3d at 1045. In addition, the test used by the *Valdez* court does  
15 not apply to plaintiff’s claim because the plaintiff in *Valdez* was a pretrial detainee while here  
16 plaintiff’s only viable claim arose when he was no longer a pretrial detainee but a convicted inmate.  
17 Under the appropriate standard, set forth in *Sandin v. Connor*, 115 S. Ct. 2293, 2300 (1995), a  
18 court must look to the particular restriction imposed and ask whether it “present[s] the type of

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20 nonexhaustion).

21 <sup>4</sup> The discussion below is not intended to cover every obstacle that plaintiff’s complaint  
22 faces, but rather to focus on the most significant. For example, the discussion does not include  
possible bars such as immunity of the defendants, exhaustion of administrative remedies, or the  
“physical injury” requirement under 42 U.S.C. § 1997e(e).

01 atypical, significant deprivation in which a state might conceivably create a liberty interest.” *Id.*  
02 Here, the monitoring and recording of phone calls does not present an atypical and significant  
03 deprivation that would create a liberty interest. *See United States v. Poyck*, 77 F.3d at 291  
04 (“Although prisoners do not forfeit all their privacy rights at the jailhouse steps, they do have those  
05 rights *severely* curtailed.”) (citation and footnote omitted) (emphasis added). Accordingly,  
06 plaintiff’s claim based upon procedural due process lacks merit and should be dismissed.

07 Substantive Due Process

08 Plaintiff bases his substantive due process claim on his contention that the policy of  
09 recording inmates’ phone calls “is outrageous conduct that shocks the conscience and universal  
10 sense of justice.” (Dkt. No. 1 at 10). However, as noted above, “no prisoner should reasonably  
11 expect privacy in his outbound telephone calls,” unless the calls are made to an attorney. *United*  
12 *States v. Poyck*, 77 F.3d at 290-91. Plaintiff cites no legal authority to support his contention.  
13 Accordingly, plaintiff’s claim based upon substantive due process lacks merit and should be  
14 dismissed.

15 Right to Counsel

16 Plaintiff’s claim based upon the Sixth Amendment right to effective assistance of counsel  
17 is as follows, in its entirety:

18 “When the defendants actually monitored and recorded Silva’s attorney-client calls,  
19 they violated his Sixth Amendment right to confidential attorney-client  
20 communications. Accordingly, Silva has [sic] cause of action under 42 U.S.C. § 1983  
for the violation of his rights.”

21 (Dkt. No. 1 at 11).

22 These allegations are insufficient to state a claim for violation of plaintiff’s Sixth

01 Amendment right to counsel. Nowhere does plaintiff describe how the monitoring and recording  
02 of his calls to his attorney actually prejudiced him. For example, plaintiff does not allege that the  
03 content of his calls was revealed to any law enforcement officer or prosecutor, or used against him  
04 in *any* proceeding. In addition, the Court takes judicial notice of two factors that indicate that  
05 plaintiff could not have suffered any prejudice due to a violation of his right to counsel: First, the  
06 record of plaintiff's proceedings in state court shows that plaintiff's trial and sentencing were both  
07 concluded by September 2, 2005. (Dkt. Nos. 208F and 208C in *State v. Silva*, Case No. 04-1-  
08 12167-8).<sup>5</sup> Thus, plaintiff's trial and sentencing were concluded *before* September 30, 2005 and  
09 any recording of phone calls that may have caused him prejudice during those proceedings may  
10 not be raised now. Second, the Court notes that in a prior proceeding here, the record reflected  
11 that plaintiff represented *himself* during the sentencing phase of his state court proceedings. (Case  
12 No. C04-1484, Dkt. No. 174 at 4). Therefore, he does not appear to have had an attorney  
13 representing him during the period in question. In light of these circumstances surrounding  
14 plaintiff's criminal proceedings in state court, plaintiff's claim based upon the Sixth Amendment  
15 lacks merit and should be dismissed.

16 Plaintiff's Claims based upon State Law

17 Plaintiff's complaint also presents claims for negligence, outrage and breach of contract.  
18 (Dkt. No. 1 at 11-12). These claims are apparently based upon state law. Because the Court  
19 recommends dismissal of plaintiff's federal claims, the Court should decline to exercise  
20 supplemental jurisdiction over the remaining state-law claims. *See Carnegie-Mellon Univ. V.*

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22 <sup>5</sup> This record is available through the website of the King County Superior Court:  
[www.kingcounty.gov/courts/superiorCourt](http://www.kingcounty.gov/courts/superiorCourt).

01 *Cohill*, 484 U.S. 343, 350 n.7 (1988).

02       (3)     Based on the foregoing reasons, the Court directs plaintiff to SHOW CAUSE,  
03 within 21 days from the date of this Order, why the complaint and this action should not be  
04 dismissed for failure to state a claim upon which relief may be granted. If plaintiff does not file  
05 a timely or adequate response to this Order, the Court will recommend that this matter be  
06 dismissed.

07       (4)     The Clerk shall send a copy of this Order to plaintiff and to the Honorable Ricardo  
08 S. Martinez.

09       DATED this 7th day of October, 2008.

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12 Mary Alice Theiler  
13 United States Magistrate Judge  
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